THE NEW YORK TEST OF VESTED REMAINDERS.

Acting upon the report of revisers, the legislature of New York, in special session, on December 10th, 1828, enacted as follows:

§ 13. "Future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain."[1]

§ 29. "When a remainder on an estate for life, or for years, shall not be limited on a contingency defeating or avoiding such precedent estate, *it shall be construed as intended to take effect,* only on the death of the first taker, or the expiration, by lapse of time, of such term of years."[2]

Section 13, branded as imperfect by Chief Justice Savage in *Coster* v. *Lorillard*,[3] has ever since been the despair of bench and bar. Experts have doubted its purpose.[4] Its seeming ambiguity has greatly lessened respect for the ability and industry of the revisers, and the accuracy of other parts of their work. No careful analysis of its language appears in opinion or text book. No printed opinion, since 1869, has sought to prove that its two definitions are consistent with each other.

Of section 29, no judicial construction is reported.

The writer believes that, when due force is given to the italicized words in section 29, the meaning of section 13 will be clear, and it will take its rightful place as an important part of the new system of real property law. The important question is: What did these sections rightly mean at the time they were enacted, when the old law was thoroughly understood, and remedies were proposed for its defects?

Let us examine the cases in which these sections were involved. In 1831, George Lorillard devised real estate to trustees for the lives of twelve nephews and nieces, the survivors and survivor of them "with remainder over, after the death of the twelve nephews and nieces, to such of their children as shall then be living."

[1] § 13, I R. S.* p. 723 (R. P. L. § 30, Cons., R. P. L. § 40).
[2] § 29, I R. S.* p. 725 (R. P. L. § 45, Cons., R. P. L. § 55).
[3] (N. Y. 1835) 14 Wend. 265, 302.
[4] Fowler, Real Property Law of the State of New York (2 ed.), 226, 228.

Eight of the trustees filed a bill in chancery "for the purpose of settling the construction of the will and codicil." The three revisers, U. S. Attorney-General Butler, John (afterwards Judge) Duer, and John C. Spencer (son of Ex-Chief Justice Ambrose Spencer, and afterwards Secretary of the Treasury and of War) were counsel in the case. Material questions were: Did the devise suspend the power of alienation beyond the new limit fixed by sections 14-16? and was it therefore void? Could living persons convey an absolute fee in possession? Could the trustees, alone, or with the twelve beneficiaries convey the trust estate? Could the fifteen living children of the twelve convey the remainder?[5]

Under the old law the devise would have been valid; for that allowed suspension of the power for the lives of any number of designated persons living at the creation of the estate;[6] and at the death of the last surviving beneficiary, would make known what remaindermen were "then living." The controlling fact was that the new section 65 declared that a sale or conveyance by trustees of an expressed trust "in contravention of the trust, shall be absolutely void."

Only Reviser Duer discussed the right or power of the fifteen to convey the remainder. He argued that it was contingent.

To Chief Justice Savage, learned in the old law and with a firm grasp on its principles[7] from twelve years' experience on the bench, the revisers' work brought darkness where light had been. In reading his opinion he mentioned "their confident belief" that their work on expectant estates would "render a system simple, uniform and intelligible, which was various, complicated and abstruse;" said that "the remainder in the present case" would not at common law have been vested; "for, by the devise, a present interest does not pass to any particular determinate person, to whom it is to remain invariably fixed;" that the new definition of vested remainders differed greatly from the old; that the remainder under discussion would come under both the new definition of vested and that of contingent remainders; but that it was contingent, and that the fifteen "have no present estate; they have a possibility. If they survive the twelve nephews and nieces, they take their proportion; if they die, no interest of theirs in the estate in question can descend to their heirs. It is impossible, then, to

[5]Coster *v.* Lorillard (N. Y. 1835) 14 Wend. 265, 302.

[6]V Edmonds, N. Y. Statutes at Large, 306, App.; Fowler, Real Property Law, 240.

[7]See Patterson *v.* Ellis (N. Y. 1833) 11 Wend. 259.

convey an absolute fee in possession. * * * By the devise the estate is inalienable; because the statute prohibits trustees from conveying in violation of their trust; and there are no persons in being who can convey the remainder." The reason he gave for declaring the new definitions of vested and contingent remainders inconsistent, was that the last part of the definition of vested remainders meant "were the present estate now to cease." Why he so construed it, he did not say. His criticism was of the language used; but he gave full effect to the clear meaning of the definition of contingent remainders.

In 1836, in *Hawley* v. *James*,[8] Reviser Spencer argued that a similar[9] remainder was contingent, citing only Cruise's Digest and the *Lorillard* case; Judge Nelson held the remainder vested, while Judge Cowen and Senator Maison thought it contingent. The decree did not decide the question; but held the substituted and ultimate remainders contingent.

In 1869, in *Moore* v. *Littel*,[10] the Court of Appeals, by a vote of five to three, held the remainder vested in a grant to John Jackson "for and during his natural life, and after his decease to his heirs or their assigns forever." Judge Woodruff in the prevailing opinion held that if a person would "have an immediate right to the possession of certain lands if the precedent estate of another therein should now cease, then the statute says, he or she has a vested remainder." He thus repeated Judge Savage's criticism of the language of section 13; but made the definition of vested remainders control. This statement is hereinafter called the "Woodruff test."

In 1872, in *House* v. *Jackson*,[11] a case arising under the same grant, Judge Peckham, writing for the court, held "as adjudged in *Moore* v. *Littel*" the remainder vested subject to be divested.

In 1899, in *Hall* v. *LaFrance*,[12] the remainder was at A's death "to the heir or heirs of her body her surviving." The court, Judge Parker writing, held the remainder contingent "because both the person to whom, and the event upon which the remainder is limited to take effect, are uncertain."

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[8](N. Y.) 16 Wend. 61, 137, 201, 239, 267, 281.

[9]"Similar" because par. 39, p. 78 substituted another devisee if a first remainderman died before the end of the trust estate, creating a condition precedent and not subsequent.

[10]41 N. Y. 66, 76.

[11]50 N. Y. 161, 165.

[12]158 N. Y. 570, 575.

In 1908, perhaps on account of the rule *"stare decisis,"* and the changes made by the Real Property Law of 1896, and the insertion therein of a new section 31, (Cons., R. P. L. § 41) the court, in *Stringer* v. *Young,*[13] held a remainder, similar so far as the definition of vested remainders is concerned, vested subject to divest, though the trust estate for the daughter's life and the remainder were separately limited.

In weighing the criticism of Judge Savage, there must be considered the ability of the revisers and the care they had taken, the long discussions in the legislature over this chapter, and the part taken therein by Reviser Butler in the Assembly and Reviser Spencer in the Senate. Further, the proposed chapter was submitted in printed form at the special session held solely for the purpose of discussing and passing, with any needed changes, chapter I and parts III and IV. On some of the sections of this article the two houses disagreed, and conference committees met and reported.[14] The revisers delayed for a year the reporting of chapter I, that they might "mature its preparation"; Reviser Duer "had been exclusively employed for the last six weeks in revising the drafts of this important chapter and maturing its provisions."[15] After all this care, section 13 was enacted by the legislature without change.

The revisers' notes were "inserted to explain the objects and reasons for any new provisions, and to indicate the authority upon which any alteration is proposed." Their plan provided for more copious notes to the proposed chapter I than to part I. Long notes referred to the new statute about "estates tail,"[16] to section 28 abolishing the Rule in Shelley's Case, and to A's power to destroy contingent remainders;[17] but there is no revisers' note to section 13, although there had been no statutory definitions of vested or contingent remainders or future estates. Humphrey's distinction between certain contingent remainders, and certain remainders vested subject to divest, was quoted by them.[18] According to that distinction a large class of remainders, including

[13]191 N. Y. 157.

[14]See Senate and Assembly Journals, Oct. & Nov., and Albany Argus, Nov. 1828.

[15]V Edmonds, N. Y. Statutes at Large, 247, 248.

[16]*Ibid,* 247, 302-304; Fowler, Real Property Law, 992, 994.

[17]V Edmonds, N. Y. Statutes at Large, 310, 311-313; Fowler, Real Property Law, 1000-1004.

[18]V Edmonds, N. Y. Statutes at Large, 315; Fowler, Real Property Law, 1005.

the one in *Moore* v. *Littel*, would be contingent, although heirs apparent were living at the creation of the estate. The revisers evidently thought that they had made the meaning clear without further note; and the legislature evidently agreed with them.

Until April 19th, 1775, New York was a colony of England; and the common law of England and Colonial Acts in force here on that day, with later resolutions and statutes (unless repealed, altered or repugnant to the Constitution) continued to be, and in 1828 were the law of this State, but subject to change by the legislature.[19] Blackstone's Commentaries (printed 1765-1769) were in 1775 the latest and best statement of that common law. The revisers had studied them carefully, and adopted his "admirable system" in "the general distribution of the subjects of the whole revision," quoted from them often, and rarely found them inaccurate.[20]

Blackstone said: "For remainders are vested or contingent."[21] Section 13 states that "future estates are either vested or contingent." Inserting *either* clearly shows the revisers' intent that every future estate must be either vested or contingent, but cannot at once be both.

Judge Savage showed that his construction of the definition of vested remainders was hopelessly inconsistent with the definition of contingent remainders. Judge Woodruff's test is in effect the same as Judge Savage's statement of the literal meaning of the definition of vested remainders. The necessity of avoiding inconsistency was pointed out to the revisers in a statute declaring their duties,[22] and a construction making two parts of a statute inconsistent with each other is to be avoided if any harmonizing construction be possible.[23] Let us, therefore, examine more closely the words used in the statute to see whether there be any necessary inconsistency.

The only technical term in section 13, "is limited to take effect," is taken verbatim from Blackstone's definition of contingent remainders:

"Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take

[19]State Constitution of 1821, Art. VIII, § 13.

[20]V Edmonds, N. Y. Statutes at Large, 246, 305, 308, 310.

[21]Vol. II * 168.

[22]Laws of 1825, ch. 324, § 2.

[23]People *ex rel. v.* Hyde (1882) 89 N. Y. 11, 18; People *ex rel. v.* McClave (1885) 99 N. Y. 83, 89; Matter of N. Y. etc. Bridge (1878) 72 N. Y. 527, 530.

effect, either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined and the remainder never take effect."[24]

This is clearly the same in substance as the new definition of contingent remainders. "Limiting an estate" means fixing its bounds as to time, and designating the persons or classes of persons intended to possess the land for that time. No statute defines "estate," but it means "the interest" which a person or class of persons has in the land.

To understand what the non-technical words in section 13 meant to those who were not expert in the old law, we turn to the 1828 quarto edition of Webster's Dictionary, and find as follows: "When, adv., 1. at the time; 2. at what time, interrogatively; 3. at which time; 4. after the time that; 5. at what time." "Whilst" —"While" "during the time that; as long as; at the time that" (clearly an adverb of time, and suggesting a possible change to "vested" when the person becomes certain and the "event" certain to happen or already happened. The correlation of "when" and "whilst" removes any possible doubt of "when" referring to time. The heading to section 13 "When future estates are vested, when contingent" also proves this.)

"Would," says the 1828 Webster, "is used as an auxiliary verb in conditional forms of speech * * * 'You would go' or 'He would go' denotes simply an event *under a condition or supposition* * * * The condition implied in 'Would' is not always expressed. 'By pleasure and pain I would be understood to mean what delights or molests us; that is, if it should be asked what I mean by pleasure and pain, I would thus explain what I wish to have understood.' In this form of expression, which is very common, there seems to be an implied allusion to an inquiry or to the supposition of something not expressed."

The revisers' reports were before the legislature in printed form; and chapter 1 was discussed for several days in each House. Hence, "The punctuation of this statute is of material aid in learning the intent of the legislature."[25] The comma between "lands" and "upon" is found in the revisers' original report. To show the functional unity of "phrases * * * and to separate them from neighboring elements the meaning of which they might otherwise improperly modify, it is often necessary to set them off by punctuation."[26] The comma is here used to separate the "upon"

[24]II Comm. * 169.

[25]Tyrrell *v.* Mayor (1839) 159 N. Y. 239.

[26]Inter. Library of Technology; Text Book on Grammar, Punctuation, etc., § 20, p. 6.

phrase from "possession," and show its connection with "would have." Of the twenty meanings given by the 1828 Webster to "upon," "if" is not one: but No. 14 is "at the time of: on the occasion of." The "upon" phrase contains no word suggesting the "now" meaning, or any other time than the actual ceasing of the prior estate, or any condition.

The rule had already been applied, that a condition stated about an event certain to happen sometime, but which might happen either before or after another specified event, was usually referred to the earliest reasonable period.[27] But the rule "applies only where the context * * * is silent; indeed the tendency is to lay hold of slight circumstances *. * * to give effect to the language according to its natural import."[28] Under the old law, Judge Savage would have been justified in applying this rule to the "upon" clause, changing the time of "the ceasing" from the intended and actual time, "the time at which," "on occasion of which" to "now," for the "would have" implied a "condition or supposition;"[29] and from 1782 to 1830 every precedent estate allowed in this State before a remainder was one that must cease sometime, and the question would be "when," and the earliest reasonable time would be "now." The only fee upon which a remainder could be limited under the common law was an "estate tail," and those estates had been abolished;[30] and a fee was the only kind of estate which might last forever. As the precedent estate in 1828 could not be a fee, it must cease, and the only condition about the ceasing might be as to the time, and the earliest reasonable time would be "now," when the question was asked.

The old law had allowed executory devises (not remainders) in derogation of a prior fee; and future estates were intended to and do include such devises.[31] The new section 16 permits a contingent remainder in fee on a prior remainder in fee, on a contingency named; and the new section 24 authorizes, subject to the rules prescribed in the article "a fee on a fee upon a contingency, which if it should occur, must happen within the period prescribed in this article." Under the new law, then, the prior estate might

[27] A late example is found in Vanderzee *v.* Slingerland (1886) 103 N. Y. 47, 53.

[28] Matter of Denton (1893) 137 N. Y. 428; Matter of Baer (1895) 147 N. Y. 348, 354.

[29] *Supra*, p. 592.

[30] Law of July 12th, 1782.

[31] V Edmonds, N. Y. Statutes at Large, 304, 305; Fowler, Real Property Law, 995, 996.

be a fee, and therefore might never end, and in such a case the remainderman would have the right to possession only if and when the fee might cease; and after such prior estates, ceasing would be "conditional," and the condition, of which "would have" would express the conclusion, would be "if and when the prior estate should cease." In stating his first class of executory devises, Blackstone had said "a future estate to arise upon a contingency * * * as if one devises land to a feme sole and her heirs upon her day of marriage."[32] The prior estate here would be intermediate and not precedent, and as she might never marry, "upon her day of marriage" would mean "if" and "when" she marries. The result is that the prior estate, whether intermediate or precedent, might be one which would never cease; and after such prior estate the condition or supposition would be found in the "upon" phrase. My test question would be, if the prior estate is a fee, "is there a person in being who would have the right, if and when (or, when, if ever) the prior estate ceases;" and if the prior estate is not a fee, and therefore must cease, "is there a person in being who will have the right when the prior estate ceases?" These questions I shall hereafter refer to as my first test, to contrast with the Woodruff test above mentioned.

To determine the comparative merits of these two tests, let us, without needless words, apply both to some of the leading cases where the ceasing of the prior estate determines or makes known who, if anyone, would be entitled to take in remainder. And, first, to the *Archer Case*,[33] decided about 1597, inserted by Professor Gray in his Cases on the Law of Real Property, referred to by Lord Hardwicke[34] as one of the two great cases from which the practice of creating trusts to protect contingent remainders arose, and never overruled or even distinguished on this question.[35] The devise was to Robert for life, and afterwards to the next heir male and to the heirs male of the body of such next heir male. At the testator's death Robert had one son, John, who survived Robert. Robert after the testator's death enfeoffed Kent with warranty or in fee, upon whom John entered, and Kent re-entered. After Robert's death John and Kent each claimed the fee. The court held (1) that Robert had only a life estate; (2) that the remainder to Robert's right heir was good because it is sufficient that the re-

[32]II Comm. * 173.

[33]I Coke's Reports, 66 a.

[34]Garth *v.* Cotton (1753) 3 Atk. 751, 753.

[35]See the 1907 three-volume edition of English Overruled Cases.

mainder "vests *eo instanti* that the particular estate determines"; and (3)—which was the principal point in the case—it was agreed *per totam curiam,*

"that by the feoffment of the tenant for life the remainder was destroyed; for every contingent remainder ought to vest, either during the particular estate or at least *eo instanti* that it determine; for if the particular estate be ended, or determined in fact or in law, before the contingency falls, the remainder is void. And in this case, inasmuch as by the feoffment of Robert, his estate for life was determined by a condition in law annexed to it, and cannot be revived afterwards by any possibility; for this reason the contingent remainder is destroyed."[36]

Woodruff test, asked at the testator's death, "Would John have the right, if Robert's estate should now cease?" Answer "Yes." Result, vested.

My first test, Robert's death being certain, "Will John have the right, when Robert dies?" Answer "He may, or he may not. If he survive Robert, he will; he may survive Robert, or he may not." Result, contingent.

In *Moore* v. *Littel,*[37] Woodruff test, "Would Parmenus have the right to a share, if John should now die?" Answer "Yes." Result, vested.

My first test, "Will Parmenus have the right to a share when John dies?" Answer "If he survive John, he will; otherwise, not. He may or he may not survive John." Result, contingent.

In *Stringer* v. *Young,*[38] Woodruff test, "Would G, C and H have the right, if the daughter now die?" Answer "Yes." Result, vested.

My first test, "Will G, C and H have the right when the daughter dies?" Answer "Not if she leave lawful issue; she may or she may not; if she do not, they will have the right." Result, contingent.

In each of the above cases the result of my first test is, and that of the Woodruff test is not consistent with the plain meaning of the definition of contingent remainders; for in the *Archer* case John was not certain to be Robert's next heir male: In the *Moore* case Parmenus might or might not be an heir of John: and in the *Stringer* case G, C and H were certain persons, but the event of the

[36]The statement in the opinion that "the contingent remainder might 'vest' during the particular estate" shows that "vest" there meant "vest in interest" and not "in possession." See *supra,* p. 592.

[37](1869) 41 N. Y. 66.

[38](1908) 191 N. Y. 157.

daughter's dying without lawful issue surviving her was uncertain.

Blackstone gives as an example of a remainder contingent as to event,

"where land is given to A for life, and in case B survive him, then with remainder to B in fee; here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent, and if B die first, it can never vest in his heirs but is forever gone; but if A die first, the remainder to B becomes vested."[39]

Applying to Blackstone's example the Woodruff test, "Would B have the right, if A now die?" the answer would be "Yes"; result, vested. To my first test, "Will B have the right, when A dies?" the answer would be "If B is then living, he will; otherwise, not. He may or may not be then living;" result, contingent.

In *Hall* v. *Elmira,*[40] the Woodruff test at the delivery of the grant, Mrs. Hall then having a living son, would be "Would the son have the right if Mrs. Hall should now die?" Answer "Yes." Result, vested.

My first test, "Will the son have a right to the whole or a share, when Mrs. Hall dies?" Answer "He will, if he survive her; otherwise, not; he may or he may not survive her." Result, contingent.

So far my first test seems consistent with the old law, with the definition of contingent remainders and with common sense; but it has its failings. For example, devise to A for life; then to B for life; then to C in fee.

Woodruff test, "Would B have the right, if A now die?" Answer "Yes." Result, vested.

My first test, "Will B have the right, when A dies?" Answer "He will, if he survive A; otherwise, not; he may or may not survive A." Result, contingent. It is absurd to suppose that the testator intended B to take possession after B's death; and, of course, neither heir nor devisee could take under B an estate which was only for B's life. According to the strict letter of my first test, the result is not, while that under the Woodruff test is, in this case, consistent both with the old law and with the definition of contingent remainders.

But take the example suggested by section 16:[41] devise to A

[39] I Comm. * 169. See *supra,* p. 592.

[40] (1899) 158 N. Y. 570.

[41] The last clause of § 32, R. P. L., Cons., R. P. L. § 42.

for life; then to B for life; then remainder to C in fee, but if C die under twenty-one, then to D in fee. Under section 11, the remainder to C is probably a precedent estate to D's remainder. The fact that section 16 allows a contingent remainder in fee after the two lives and the remainder to C does not prove that the second remainder to a designated person in fee must always be contingent. It must be remembered that sections 15 and 16 were enacted with reference to the suspension of the power; and if the second remainder in fee is vested, the power under the former definition would not be suspended, as D could convey his interest, and C and D would own and could convey the whole remainder. Where, however, the defeasible fee takes effect at the testator's death, or after only one life, the second remainder in fee would not violate the two-lives limit. But the last sentence in section 24 clearly implies that the second remainder in fee under that section is contingent.

Woodruff test (under section 16), "Would D have the right, if C now die?" Answer "Yes." Result, vested.

My first test, "Would D have the right, if and when C's estate should cease?" Answer "Not unless it cease by C's dying under twenty-one; C may or may not die under twenty-one." So far as appears from the will, C's estate may cease otherwise than by his dying under twenty-one; and if the answer be given solely according to the plan the testator has made, and before the law is invoked to decide whether C's estate can cease otherwise than by his death under twenty-one, the result would be: contingent. But the law would say that the remainder to C could cease only by C's death under twenty-one; for if he reached twenty-one, the only condition on which D would have the right would be gone, and C's estate would last forever; for even if C were outlawed for treason, the forfeiture would be only for his life, and at his death his estate would return to his heirs, devisees or assigns; and the State's title by escheat results from the State's being heir of an intestate dying without heir by blood (or, lately, by adoption).

The answer to my first test question is very doubtful, if "would have" refers to the simple fact of the right of possession, *i. e.* to what "would happen, if"; and depends on whether the answer is to be made from the provisions of the will, and the testator's scheme as applied to the facts existing at his death, or from the results of applying the law thereto before stating the result.

My first test is, then, consistent with the definition of contingent

remainders until we reach the last two cases, but then fails, and is consistent in its application to the last case, only if the test be answered before the law is applied. The fact that it gives the right result more frequently than the Woodruff test does not justify us in supposing it the true test. We search the definition of contingent remainders and the other sections of the chapter for reasons why we should let the provisions of the will, and the estates remaining possible at the testator's death, control. In the definition of contingent remainders, we find that future estates are "contingent, whilst the person to whom, or the event upon which they are *limited to take effect,* remains uncertain;" and not, while the event upon which they *shall* take effect in possession remains uncertain, or while it is uncertain whether they shall ever take effect. It is the language of the limitation, construed by the court with reference to the whole will, to discover the testator's intent, which determines upon what event the future estate is limited to take effect, and whether that event is certain to happen. In devise to A for life; then to B for life; then to C in fee, the only event stated in the limitation is A's death; and as that is certain to happen, and B is a certain person, B's life estate is not contingent under the definition of contingent remainders. Under section 17, in devise to A for life; then to B for life; then to C for life; then to D in fee, C's life estate is the one which is void, though in fact he might die the day after the testator, and before A or B. Under section 19, if a fee be limited after an estate to A for the lives of B, C and D, the lives of B and C control. Thus we find that the plan of estates created controls, and not what may happen after the testator's death.

Accordingly, I thus frame my second test question: "According to the plan, or if the plan should be carried out, or events occur as planned or expected by the testator, would B have the right at A's death?" Applied to the following plan:[42]

To A for life: To B for life: To C in fee, the answer is "Yes." Result, vested. Applied to another of the above cases, the plan would be:

To A for life: To B in fee, if he survive A. My second test "according to the plan, would B have the right at A's death?" would be answered "He might or he might not; according to the plan, he would if he survived A; otherwise, not; he may or he may

[42]See *supra,* p. 596.

not survive A." Result, contingent, as stated by Blackstone;[43] while the Woodruff test would make it vested.

If we now turn to Chief Justice Willes' opinion in *Parkhurst* v. *Smith*,[44] we find the judges of the House of Lords agreeing in the following statement:

"And we think there are but two sorts of contingent remainders which do not vest. (1) Where the person to whom the remainder is limited is not *in esse* at the time of the limitation; (2) Where the commencement of the remainder depends upon some matter collateral to the determination of the particular estate."

Referring to the two plans above, we find that the commencement of the remainder does in the first, and does not, in the second, depend upon B's surviving A, a matter collateral to A's death, for it neither hastens nor delays it.

Since the Willes' test was the last authoritative statement of the highest English Court upon the subject, before April 19th, 1775, it was part of the common law of England in force on that day; and since the result of its application, and of the application of Blackstone's definition of contingent remainders is thus far the same as the result of the application of my second test, there would seem to be no need of a revisers' note to section 13: the change made by section 13 was in the form, and not in the effect of the new definition.

(To be concluded.)

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[43] See *supra*, p. 596.

[44] (1741) Willes 327.